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COMMENTARY

SCHOLARSHIP AMOK: EXCESSES IN THE PURSUIT OF TRUTH AND TENURE

Kenneth Lasson*

[N]ot everything that man thinks must he say; not everything he says must he write, but most important not everything that he has written must he publish.

KING SOLOMON (1033–975 B.C.)¹

There are two things wrong with almost all legal writing. One is its style. The other is its content.

YALE LAW PROFESSOR FRED RODELL (1907–1980)²

Here we are, three millennia after Solomon and a full half-century since Fred Rodell, and what have we?

In 1937, when Rodell issued his once-famous diatribe, some 150 law-related journals were being published³ (not to mention thousands of local newspapers and countless full-color comic books). Now there are over *eight hundred* legal periodicals⁴ (not to mention a drastically dwindled number of daily papers, and precious few comics). Both Solomon and Rodell have been all but forgotten. What, indeed, have we wrought? Although Rodell predicted his original panning would have no effect, could he have anticipated the sheer dimensions of this worst-case scenario — that his “professional purveyors of pretentious popycock”⁵ would have spawned so furiously, that the contemporary

* Professor of Law, University of Baltimore. I wish to acknowledge all those who inspired this Commentary, many of whom know who they are.

These notes are offered mostly as an accommodation to the editors, who labor under the dual handicaps of tradition and inexperience. Recognizing the few pros and cons of footnoting, however — see *infra* pp. 937–41 — I have taken some pains to make my references a bit more relevant, entertaining, and minimal than the reader who has gotten this far has a right to expect.

¹ Rav Yisroel Salanter (1810–1883) attributes the saying to Solomon in KOHELES/ECCLESIASTES 202 (Artscroll Tanach Series ed. 1976). See *Ecclesiastes* 12:12 (“[T]he making of many books is without limit.”).

² Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38, 38 (1936). Rodell’s *Goodbye* was once called “perhaps the most widely read — and most controversial — article in all of legal literature.” Margolick, *Always the Rebel*, Nat’l L.J., May 5, 1980, at 1, 24, col. 2; see also Wright, *Goodbye to Fred Rodell*, 89 YALE L.J. 1455 (1980).

³ See INDEX TO LEGAL PERIODICALS, Aug. 1937–July 1940.

⁴ See 9 CURRENT LAW INDEX pt. a (1988) (providing a list of such publications).

⁵ Rodell, *Goodbye to Law Reviews — Revisited*, 48 VA. L. REV. 279, 286 (1962).

law reviews he collectively called "spinach"⁶ would have mushroomed into such a gargantuan soufflé of airy irrelevance?

Lo, the voices are heard once again in the wilderness, from the bewildered among us innocent (or ignorant) enough to try writing the wrongs perpetrated in the name of Scholarship.

Few professors today delude themselves about (or are able to luxuriate in) the long-romanticized lifestyle of Academia: walking the quiet quadrangles of neatly manicured college gardens, discoursing timelessly with colleagues, thinking higher thoughts. Fewer still aspire to scholarship purely in search of Truth. Nowadays the goal of publication is much less to find answers than to avoid perishing in pursuit of promotion and tenure.

The threshold question, of course, is why Scholarship? "He who increases knowledge," said Solomon, "increases grief."⁷

Certainly there exist among us the genuine scholars of yesteryear, dutifully reporting their original ideas and producing from time to time provocative prose and innovative agendas. (Rodell himself belonged in this small group, if for no other reason than having been the first to say publicly what so many of us — weaker-kneed, wimpier-eyed, and more thoroughly word-processed — privately bemoan within the *sanctum sanctorum* of the faculty lounge.)

But for every pure scholar we have a dozen-and-a-half of the innocent ersatz, for every diamond a heap of rhinestones. Some of them are decent enough thinkers stickied-up by pedestrian prose, industrious worker-bees who — simply by virtue of the thousands of articles with which they must periodically compete — must of necessity be deemed mediocre. They are in greater part, however, competent enough teachers without anything original to write, doomed to scholarly mediocrity by academic imperative — coerced clones who are whipped into a hack's frenzy, urged to jump through hoops held up by the local promotion-and-tenure committee, forced to shimmy down the chutes of the publication process.

To some degree all of them — whether genuine scholars, would-be wisemen, or coerced clones — are motivated by the gratification of ego, the satisfaction of habit, and the expectations of university image-makers. In turn these traits are fueled by faculty self-studies, administrative mission statements, and fiats laid down by the Association of American Law Schools,⁸ most of which become etched in ivory long before their floppy disks ever begin to stiffen.

This Commentary is intended as much to define scholarship as to debunk it, to separate the wind-blown chaff from the few kernels that

⁶ See Rodell, *supra* note 2, at 45.

⁷ *Ecclesiastes* 1:18.

⁸ See, e.g., ASS'N OF AMERICAN LAW SCHOOLS, ASSOCIATION HANDBOOK § 6.8 (1988).

might nourish the mind. Legal scholarship is largely illustrated by the law reviews which, conversely, both contribute to and reflect the value system by which the academy is governed. Even cursory observation of the literature leads to an inescapable conclusion: the number of whole-grain scholars is much smaller than that suggested by the burgeoning reviews, the number of whole-grain journals but a fraction of the fruited plains currently being harvested in law libraries across the land. Analysis, research, and writing are overblown, while classroom competence, community service, and non-law review scholarship are under-credited. The system is askew. The academy has a problem.

I. MULTITUDES AND MINUTIAE

In an ideal world, people govern themselves; governments pass laws only when necessary; laws are easy to understand and follow; lawyers are uniformly bright, energetic advocates — fair, ethical, and sensitive; they emerge from law schools offering logical, interesting curricula taught by fair, sensitive professors; and the curricula are complemented by the fruits of faculty research — which scholarship is distilled into useful, interesting articles and published in well-edited reviews.

In the real world all of the above may exist, but in greatly diminishing degree. Scholarship could be valuable; most of it isn't. Whatever rich stew there might have been thins quickly into gruel through the sheer multitude of journals seeking fodder for their troughs. Slops fill the law reviews. Simply put, there are too many of them.

Consider the numbers involved. Of the 800-plus journals in the exclusive *Current Law Index* alone, most appear at least three times throughout the year, each with several lead articles apiece. By conservative estimate, that's *five thousand* new pieces annually! Could even a small percentage of this massive productivity (which law librarians privately label the Junk Stream) be worth readers' whiles?

And, one must hasten to ask, *what* readers? Most reviews have very limited circulations, consisting primarily of libraries and alumni. Few in the latter group pay any attention to the esoteric titles appearing on the cover, much less to the contents inside. For all the work professors put into law review articles, one would think they'd be able to attract a larger audience than the sprinkling of colleagues who skim through off-prints out of courtesy or the handful of students who may wade through them because they've been assigned. Even fewer practicing attorneys read such secondary sources out of non-billable interest.

Helping to perpetuate this endless multitude of articles are exhaustive "research tools," supplying comprehensive cross-references and mind-boggling databases. The *Index to Legal Periodicals* and

the *Current Law Index* both reflect and contribute to the epidemic proportions of publication.

Beyond sheer numbers, consider the journals themselves. The *Harvard Law Review* is arguably the oldest,⁹ still among the toughest to break into,¹⁰ and certainly the one most emulated, both in form and content. Yet even *Harvard's* goals were exceedingly modest at the beginning. From Volume 1, Number 1:

Our object, primarily, is to set forth the work done in the school with which we are connected, to furnish news of interest to those who have studied law in Cambridge, and to give, if possible, to all who are interested in the subject of legal education, some idea of what is done under the Harvard system of instruction. Yet we are not without hopes that the *Review* may be serviceable to the profession at large.¹¹

How serviceable the *Harvard Law Review* has been in all the years since remains open to question, but of the most-cited articles in the past half-century the overwhelming majority come from Cambridge.¹²

Nevertheless every law school now has at least one review to call its own, each looking and reading depressingly like the rest. Despite scattered attempts by editors to distinguish their journals by theme and discipline, redundancy abounds. Besides the fundamentally fungible general-interest reviews, we have the *Journal of Law and Religion* and the *Journal of Church and State*; the *International Lawyer* and the *Journal of International Law* (not to mention the *Connecticut Journal of International Law*, the *Yale Journal of International Law*, and the *Wisconsin Journal of International Law*); the *American Criminal Law Review*, the *Criminal Law Journal*, the *Criminal Law Bulletin*, the *Criminal Law Quarterly*, and the *Criminal Law Review*. The list goes on and on. Law reviews are published from Adelaide to Zambia. There's the *Pacific Basin Law Review*, the *San Fernando Valley Law Review*, and the *Samoan Pacific Law Review*. Don't know which one is best for your little gem-of-an-opus? Try the *Directory*

⁹ See Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215 (1981).

¹⁰ If so, certain enraged readers may ask, how can it accept a piece like this? The writer himself, though, rejects Groucho Marx's famous analysis — "I'd never join a club that would have somebody like me as a member" — and congratulates the editors on their good judgment. Truth to tell, given the central thesis presented herein, there was little doubt it would be published *somewhere* among the 800-plus journals currently clogging legal libraries everywhere; might as well start at the top. For a confidential list of those journals that rejected this article, please send a self-addressed stamped envelope to Professor Kenneth Lasson, University of Baltimore School of Law, Maryland at Mount Royal, Baltimore, Maryland 21201. This offer expires when I run out of self-satisfaction.

¹¹ 1 HARV. L. REV. 35 (1887).

¹² See Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540, 1549-51 (1985). In addition, *Harvard* is still the only review in America that is self-sustaining, unsubsidized by university or bar association. See Cane, *supra* note 9, at 215.

for *Successful Publishing in Legal Periodicals*, which lists only the 450 most choice ones.

The lead articles themselves are often overwhelming collections of minutiae, perhaps substantively relevant at some point in time to an individual practitioner or two way out in the hinterlands — and that almost entirely by chance. Otherwise they are relegated to oblivion, or if lucky to a passing *but see* in someone else's obscure piece.

True (and perhaps good), law today pervades all aspects of life — but must all aspects of life be treated in law reviews? Here's a sampling of recent articles:

*The Unrecognized Uses of Legal Education in Papua New Guinea*¹³

*The Legal Status of Fish Farming*¹⁴

*Epistemological Foundations and Meta-Hermeneutic Methods: The Search for a Theoretical Justification of the Coercive Force of Legal Interpretation*¹⁵

*If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?*¹⁶

*Judicial Review: From the Frog to Mickey Mouse*¹⁷

*What's Love Got To Do With It? Critical Legal Studies, Feminist Discourse, and the Ethic of Solidarity*¹⁸

*Morality or Sittlichkeit: Toward a Post-Hegelian Solution*¹⁹

*Toward a Legal Theory of Popular Culture*²⁰

*Toward an Economic Theory of Voluntary Resignation by Dictators*²¹

*The Differentiation of Francophone Rapists and Nonrapists Using Penile Circumferential Measures*²²

*Why Study Pacific Salmon Law?*²³

Why, indeed.

You may not be able to tell an article by its title, but it's evident that originality is in short supply among authors and editors wonder-

¹³ 7 B.C. THIRD WORLD L.J. 1 (1987).

¹⁴ 1987 J. PLAN. & ENVT'L. L. 484.

¹⁵ 68 B.U.L. REV. 733 (1988).

¹⁶ 39 SYRACUSE L. REV. 1445 (1988); see also *New South Carolina Dog Bite Rule*, 38 S.C.L. REV. 236 (1986).

¹⁷ 32 N. IR. LEGAL Q. 284 (1981); see also *Rediscovering Traditional Tort Typologies To Determine Media Liability for Physical Injuries: From the Mickey Mouse Club to Hustler Magazine*, 10 HASTINGS COMM/ENT L.J. 969 (1988).

¹⁸ 11 HARV. WOMEN'S L.J. 53 (1988).

¹⁹ 10 CARDOZO L. REV. 1389 (1989).

²⁰ 1986 WIS. L. REV. 527.

²¹ 5 INT'L REV. L. & ECON. 199 (1985).

²² 13 CRIM. JUST. & BEHAV. 419 (1986).

²³ 22 IDAHO L. REV. 629 (1986).

ing what to call their mind-numbing research. According to LEXIS, the words "toward," "model," and "theory" have appeared in no fewer than 7275 titles during the past decade alone²⁴ — making them the most popular titular buzzwords since "integrated" and "functional" came down the pike. "Confusion" reigns at the top of 358 recent articles.²⁵ In fact you can find almost any word you can think of — even "penile" has shown up six times in the past three years.²⁶

Legislative analysis frequently turns into law review manure. Do we really need 141 separate articles on federal solid-waste-disposal laws? Would that the promulgators of scholarship patterns recognize the dimensions of their own garbage-removal problem. Too often, though, they're more concerned with churning it out. They pollute the environment. They miss the forests they destroy for the knotted trees in whose dark shade they obscurely bask.²⁷

But the journals continue to take themselves ever so seriously. That's another reason why the literature of the law is perhaps the most massive of any profession. A colleague of mine²⁸ reports that the editors of one midwestern law review were not amused when he asked them the status of their potato-law symposium issue. Perhaps they were having trouble digging up lead articles, but chances are they had too many sacksful to choose from.

II. VALUE AMONG THE VOLUME(S)

It's been said before that law reviews were made to be written and not read. Regardless of their questionable benefit to bar and bench, they do have some value for some students. The few who "make law review" no doubt receive exceptionally good training in logical thought and formal exposition, not to mention source-checking.

²⁴ The figures, tabulated as of November 1989, are absurdly easy to gather and verify by modern computer. My thanks to University of Baltimore Law Librarian Emily Greenberg and her associate Will Tress for their generous instruction and use of the school's Lexis key. Tress holds the current world records (both semester and career) for the fewest "inappropriate command" rebukes from a legal database.

²⁵ Look it up yourself.

²⁶ Could we be moving "Towards a Model Penile Code"?

²⁷ A pertinent passage:

[T]he possible undervaluation of motherhood entailed by the mother/soldier parallel is similar to the possible undervaluation of women's work implied by the elementary school teacher/garbage collector Undervaluing the traditionally female half of the parallel is only additional evidence of the culture's phallocentrism; it does not justify refusing to revalue nurses, teachers, and mothers at least to the extent that real estate appraisers, garbage collectors, and soldiers are valued.

Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1329 (1987). This article runs 58 pages and 34,072 words — of which 42 are either "phallocentrism" or "phallocentric" (meaning male dominance).

²⁸ Professor John Lynch, faculty advisor to the *University of Baltimore Law Review*.

Indeed, the reviews can do a good job correcting deficiencies in (or at least complementing) the traditional law school curriculum, which frequently provides precious little in the way of research and writing. They also offer an outlet for student initiative in the face of curricular boredom. However, the hard fact that the majority of law reviews are exclusive clubs, closed to all but those with the highest grades or demonstrated writing ability, calls the scope of their educational value into question.²⁹

A good many professors can likewise benefit from researching and writing within their chosen fields of interest and discipline, in the process stimulating their involvement and dissipating that particular inertia which often permeates the Ivory Tower.

But the limited value of legal scholarship as it appears in law reviews is largely outweighed by its costs. The proliferation of research and writing tends more to increase quantity than quality. One article is no longer good enough for promotion; an aspirant must establish a "pattern" of publication.³⁰

Professorial purposes can be accomplished in better ways than *omphaloskepsis* (law review-quality Greek for "contemplation of the navel").³¹ Belly-button gazing should be a luxury allowed only those few whose writing is deemed both incisive and succinct. The rest should be encouraged to more logical productivity as teachers and community leaders.

Considering the scholarly stuff many obscure writers have to offer, they deserve the anonymity promised by the multitude of lesser journals. Some might even prefer it.

Meanwhile, the impact of law reviews on the judiciary is diminishing;³² would their absence cause the courts to cease viewing issues analytically? No more than closing down the Department of Agriculture's Rural Electrification Administration (Office of Information and Public Affairs) would have any effect whatever on television watching in Appaloosa. In fact, as a casual glance through *Shepard's Law Review Citations* will disclose, the overwhelming majority of articles are noted not by courts or legislatures, but by *one another*!³³ Re-

²⁹ Some feel the fact that law reviews are mostly student-run constitutes a fundamental weakness. See J. SELIGMAN, *THE HIGH CITADEL* 183-85 (1978).

³⁰ See UNIVERSITY OF BALTIMORE SCHOOL OF LAW, *FACULTY HANDBOOK* at J-6 (1979-1980). "Mechanical requirements cast in terms of a specific number of articles of a particular form or in particular journals are likely to cause more harm than good." Cramton, *The Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1, 11 (1986).

³¹ Perhaps a better description is "sesquipedalian tergiversation" (multi-syllabled evasiveness).

³² See Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. LEGAL EDUC. 313 (1989).

³³ See *id.* at 320 (pointing out the lack of "value and pertinence" of law reviews to judicial decisionmaking); Schuck, *Why Don't Law Professors Do More Empirical Research?*, 39 J. LEGAL EDUC. 323, 336 (1989) (same).

markably few are ever cited in the primary sources — case reports or annotated codes.

There are so many publications clamoring to fill their pages with Law Most Learned, however, that few contributors need worry about dwindling forums for their prose. Moreover, all of the participants in the process — pupils, professors, practitioners, printers, and publishers — are quite content to go on greasing one another's palms and egos.³⁴

Much of this enormous hodge-podge has a built-in obsolescence about it as well, largely by virtue of the law reviews' extended editing process. Most often the lag is so long between the first dull gleam in an author's eye and the finished product that whatever might be timely and relevant is largely lost on whatever few readers may be out there. The stuff is simply stale. Scholarship in the scientific community, by way of comparison, is of considerably greater utility and immediacy; that may explain why articles in medical journals, for example, are generally much shorter and contain fewer footnotes.³⁵

Here and there amidst the morass of law reviews are occasional stabs at candid self-criticism. For example, various observers have noted that supposedly analytical commentaries are predominantly descriptive and mildly plagiaristic;³⁶ those published during pending litigation interfere with the judicial process;³⁷ the scholarly voice lacks factual discipline;³⁸ and that scholarship *qua* scholarship on law may not even exist.³⁹ Justice William Douglas said that law review articles are written by paid hacks espousing the views of their clients.⁴⁰ Professor Arthur Miller argues that objectivity is impossible in law review articles because of lawyers' inalienable commitment to advo-

³⁴ See Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 J. LEGAL EDUC. 343, 344-45 (1989); Rodell, *supra* note 2, at 45. But cf. Strong, *The Iowa Law Review at Age Fifty*, 50 IOWA L. REV. 12, 13 (1964) (supporting the existence of law reviews).

³⁵ See Austin, *Footnotes As Product Differentiation*, 40 VAND. L. REV. 1131, 1152 (1987); see also *infra* notes 97-102 and accompanying text (arguing that the language of most law review articles does not effectively communicate to nonscholars).

³⁶ See, e.g., Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 322-23 (1985).

³⁷ See *GTE Sylvania Inc. v. Continental T.V., Inc.*, 537 F.2d 980, 1018 (9th Cir. 1976) (Chambers, J., concurring and dissenting).

³⁸ See Getman, *Voices*, 66 TEX. L. REV. 577, 580-81 (1988).

³⁹ See Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 YALE L.J. 1205, 1205 (1981); see also Jensen, *The Law Review Manuscript Glut: The Need for Guidelines*, 39 J. LEGAL EDUC. 383, 385 (1989) ("The legal publication system is, to put it bluntly, absurd."); Leibman & White, *How the Student-Edited Law Journals Make Their Publication Decisions*, 39 J. LEGAL EDUC. 387, 418 (1989) (discussing weaknesses in the law-review model and ways to correct those weaknesses). "[I]f a publication medium is perceived by its users to be biased, capricious, narrow, rigid, and unqualified, they will seek alternatives, even if the perceptions are mostly or totally unfounded." *Id.*

⁴⁰ See Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 229-31 (1965).

cacy.⁴¹ Professor Roger Cramton sees their "extraordinary proliferation" as "harmful for the nature, evaluation, and accessibility of legal scholarship."⁴² Professor Elyce Zenoff (in an article entitled *I Have Seen the Enemy and They Are Us*) sums up the common criticisms: "Published articles lack originality, are boring, too long, too numerous, and have too many footnotes, which also are boring and too long."⁴³

But these criticisms are few and far between and — perhaps also because they are published in law reviews themselves — go widely ignored.

It was Rodell, again, who summed it up best — over fifty years ago: "This centripetal absorption in the home-made mysteries and sleight-of-hand of the law would be a perfectly harmless occupation if it did not consume so much time and energy that might better be spent otherwise."⁴⁴ Instead, we go on "blithely continuing to make mountain after mountain out of tiresome technical molehills,"⁴⁵ not to mention the sacrifices made in personal income. It appears that law professors must be either independently wealthy or married to rich spouses. "Else why — once they have won their full professorships, at any rate — do they keep submitting that turgid, legaldegooky garbage to law reviews — for free?"⁴⁶

Here's a modest (and unoriginal)⁴⁷ proposal for reform: let the local reviews enhance the educational value needed to justify their

⁴¹ See Miller, *The Myth of Objectivity in Legal Research and Writing*, 18 CATH. U.L. REV. 290, 294-95 (1969).

⁴² Cramton, *supra* note 30, at 8. For another intelligent critique, see Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1 (1986). See also Antoline, *A Burst of Specialty Alternatives*, STUDENT LAW., May 1989, at 26-30 (discussing the proliferation of "alternative journals"); Jensen, *supra* note 39, at 384 (mentioning a "glut" of legal articles); Leibman & White, *supra* note 39, at 418 (describing a "flood of paper and ink at the medium- and high-impact journals").

⁴³ 36 J. LEGAL EDUC. 21, 21 (1986) (footnotes omitted); see also Gresham's *Law of Legal Scholarship*, 3 CONST. COMMENTARY 307, 309 (1986) (suggesting that the principle of "adverse selection" operates in legal scholarship to ensure that "law review literature will be dominated by articles taking silly positions"). For an especially thoughtful, well-articulated — and unheeded — piece, see Bard, *Scholarship*, 31 J. LEGAL EDUC. 242 (1981).

Scholarship is legal academe's temple jade: we sing its glories and genuflect before it, bedizen it with jewels, and then demean it by pretending to make it the gate keeper of the profession. It becomes the price we must pay to be a law professor, rather than the prime privilege of that calling. And, most justly, it reciprocates in kind, by forcing us to accept as scholarship work that is little more than ritualized diligence.

Id. at 242; see also Murray, *Publish and Perish — By Suffocation*, 27 J. LEGAL EDUC. 566, 566 (1975) (quoting George Eliot, who offered this sadly under-used benediction: "Blessed is the man who, having nothing to say, abstains from giving in words evidence of the fact."); Cane, *supra* note 9, at 221 nn.35-39 and accompanying text (arguing that law reviews form the basis of an "old boy" network that propagates itself from generation to generation). For a particularly bitter, and thus more easily dismissed, attack on the system, see Elson, cited above in note 34.

⁴⁴ Rodell, *supra* note 2, at 43.

⁴⁵ *Id.*

⁴⁶ Rodell, *supra* note 5, at 288.

⁴⁷ See, e.g., Martin, *The Law Review Citadel: Rodell Revisited*, 71 IOWA L. REV. 1093,

existence by making themselves accessible to all the local law students and professors, and reduce their publication costs by putting all articles onto a computerized database instead of into print. Students and professors alike would thereby be able to polish their research and writing skills — without wasting the time of printers and publishers, postal workers, law librarians, and compulsive readers of junk mail.

III. SCHOLARSHIP: WE KNOW IT WHEN WE SEE IT

It is quite possible that reducing the number of law reviews might only address the symptoms of a deeper malaise — in particular the value system reflected by promotion-and-tenure policies as they are worshipfully applied through the criteria of “research, analysis, and writing.”

Webster's defines scholarship simply as “a fund of knowledge and learning.”⁴⁸ Faculties of law have much more difficulty with the concept; they grapple with the meaning of scholarship just as Justice Stewart was unable to define pornography. “But I know it,” he said, “when I see it.”⁴⁹

For purposes of promotion and tenure, “scholarship” means written and published materials which meet all of the following criteria: they are “analytical,” “significant,” “learned,” “well-written,” and “disinterested.”⁵⁰

Each of these terms is likewise chewed over like cud, all the while defying objective definition. To be *analytical*, according to the bylaws of the typical faculty, “[t]he materials must provide a detailed, well-supported and sophisticated analysis that increases our understanding of the topic, and must do more than describe a body of law or a legal problem.”⁵¹ A colleague of mine speaks of “massaging ideas,” whatever that is. As we shall see shortly, no amount of analysis seems to increase our understanding of the term itself.

1104 (1986); see also Hewitt, *Altered States: Evolution or Revolution in Journal-Based Communications*, 25 AMERICAN LIBR. 497, 497–500 (1989); Westwood, *The Law Review Should Become the Law School*, 31 VA. L. REV. 913 (1945).

⁴⁸ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1051 (1988) [hereinafter WEBSTER'S DICTIONARY].

⁴⁹ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

⁵⁰ See, e.g., UNIVERSITY OF BALTIMORE SCHOOL OF LAW, FACULTY HANDBOOK at H-1.6, H-1.7 (1989–1990) [hereinafter BALTIMORE FACULTY HANDBOOK]; cf. UNIVERSITY OF MARYLAND SCHOOL OF LAW, FACULTY HANDBOOK at B.2-1 (1985) (noting that “[a] candidate for tenure is required to have engaged in significant research and to have produced a significant product or products”). An exceptionally liberal policy, along the lines of that recommended in this Commentary, may be found in SANTA CLARA UNIVERSITY, FACULTY HANDBOOK (1987), which notes that the criteria for promotion and tenure include an evaluation of the candidate's creative work, including “recognized accomplishment or significant production in the arts of painting, sculpture, music, drama, fiction, poetry, dance, journalism, or the like.” *Id.* ¶ 3.6.2.

⁵¹ BALTIMORE FACULTY HANDBOOK, *supra* note 50, at H-1.6.

To be *significant*, "[t]he materials must make a significant contribution to the legal literature. They must do more than reiterate or rephrase previous analyses of the topic and they must not represent the work of others."⁵² But the words "significant" and "more than" are inescapably subjective. Were they applied strictly, a significant portion of all law review material would be thrown out as representing in some way the work of others.

To be *learned*, "[t]he materials must demonstrate deep familiarity with and understanding of the body of knowledge associated with the topic."⁵³ To be *well-written*, they "must be written in a manner appropriate to the subject matter, and must demonstrate the candidate's ability to convey his or her ideas effectively."⁵⁴ Again, these are patently subjective criteria that in most cases give no more guidance in promotion and tenure decisions than does the gut feeling of how well a candidate gets along with his colleagues.

Indeed, the only objective standard is the last. To be *disinterested*, "the materials must not be published to serve the interests of any client, either paid or pro bono."⁵⁵ But the overinclusiveness of this standard suggests a failure of common sense. Suppose a pro bono article goes *against* a client's interests? Suppose a professor is *commissioned* to do an exhaustive study? In neither case should his scholarship be discredited out of hand, but it is.

Besides their inherent subjectivity, the promotion-and-tenure standards of most faculties focus unduly on articles published in law reviews. Often neither briefs nor practice manuals — no matter how learned or useful — are considered "scholarship." Nor would a casebook or treatise be as presumptively satisfactory as a law review article. One wonders how the promotion and tenure committee would handle Socrates, who never published a word.⁵⁶

One senior professor summed up the meaning of scholarship for the purposes of promotion and tenure from a much more practical and concrete point of view, giving this advice to a junior colleague: the way to get ahead, he advised, is to "take an obscure little problem that no one has thought much about, blow it out of all proportion, and solve it, preferably several times, in prestigious law reviews."⁵⁷

Law schools generally consider scholarship to be an amalgam of research, analysis, and writing. As such it is taught as a required

⁵² *Id.* at H-1.6, H-1.7.

⁵³ *Id.* at H-1.7.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ I didn't think of this myself, but neither, I'm sure, did the journalist (whose name I forget) from whom I stole it.

⁵⁷ Barrett, *To Read This Story in Full, Don't Forget To See the Footnotes*, Wall St. J., May 10, 1988, at 25, col. 2.

course in the first year, and genuflected upon in all years hence, from practice through retirement. But scholarship can be largely demystified by examining its traditional components.

A. Research: Bushwhacking Through the Thickets

Legal research is at once objective — that is, there are a finite number of sources to be gathered and culled — and an open-ended art form.

With the advent of computerized data banks such as *Lexis* and *Westlaw*, gleaning all the cases on point is as easy as playing Trivial Pursuit and maybe even more fun. Finding everything that's ever been written on the subject requires little more than leafing through the *Current Law Index* or its older but perfectly adequate counterpart, the *Index to Legal Periodicals*. And the whole mass can be saturation-bombed with cross-references by resorting to an endless array of *Shepard's Citations*. (There, I've given away the secrets of legal research in less than a paragraph!) As for gleaning the most relevant and salient authorities, the possibilities are infinite — and are what separate the grown-up academics from the boys and girls.

Nowadays, unfortunately, research skills often amount to little more than mastery of the citation forms. The genuine scholars, besides being creative writers, are highly selective in their choice of relevant data. But many modern professors tend to toss their excess research into the annotation hopper and leave it to their readers (or editors) to separate the salient stuff from the mildly tangential. That's why it's harder to write without footnotes than with them: it takes a good writer to decide what's on point and what's off — it's easier to keep baby and bathwater in the same textual tub. And it's safer, both intellectually (allowing the writer to straddle any issue by taking a strong position in the text while waffling below) and morally (permitting him to stave off plagiarism with grudging acknowledgments in four-point type) — not to mention more ego-gratifying (enabling intricate citation of arcane sources at stupefying length).

The number of notes in an article is still deemed a measure of its erudition. Although there are occasions of reverse snobbery — where it is implied (as in this essay)⁵⁸ that notes are beneath an author's time, dignity or expertise — the more common scholarship seeks to impress by both magnitude and multitude of bottom-matter. The longer the note, the greater the breadth of its author's knowledge; the more numerous the references, the more comprehensive his treatment of the subject matter. The current individual record-holder is Arnold

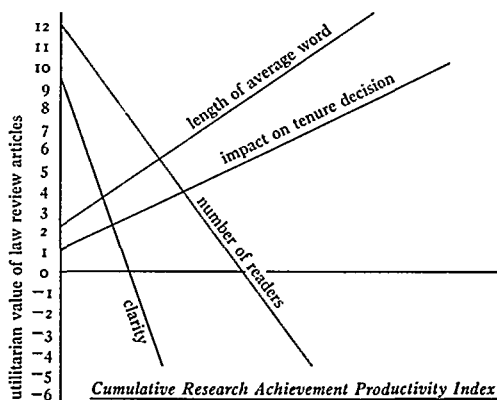
⁵⁸ See *supra* note *; *infra* note 67. For a good example of authors' disdain for footnotes flying in the face of editorial compulsion to add them, see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

S. Jacobs, Esq., who recently drew his readers away from the text no fewer than 4824 times — easily eclipsing the former mark held by Dean Jesse Choper (1611) as well as the group title (3917 by the *Georgetown Law Journal* staff).⁵⁹ Too bad no promotion-and-tenure credit is given the transcendent task of bushwhacking through such unintelligible thickets.

Some writers limit their notes strictly to citations of authority, disdaining what they consider flights of creative irrelevance and esoteric nit-picking. But the purists are passé. The new chic in noting is to write rambling distinctions laced with "fugitive" sources — exotic references, rare books, or "letters on file with the author." Incomprehensible law-and-economics graphs and diagrams are also In.⁶⁰

⁵⁹ See Oser, *Numerous Notes No Shot in Foot*, Nat'l L.J., Jan. 16, 1989, at 35, col. 1; see also Jacobs, *An Analysis of Section 16 of the Securities Exchange Act of 1934*, 32 N.Y.L. SCH. L. REV. 209 (1987) (accompanying Jacobs' 4824 footnotes with 491 pages of text); Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1 (1984) (accompanying Choper's 1611 footnotes with 208 pages of text); Project, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986*, 75 GEO. L.J. 713 (1987) (accompanying the Georgetown staff's 3917 footnotes with 585 pages of text). The alleged record-holder for judicial opinions is *United States v. E.I. Dupont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), with 1715 footnotes. See Kaplan, *The Article in a Law Review That Included the Most Footnotes Is . . .*, Nat'l L.J., Mar. 18, 1985, at 4, col. 3. Equally useful information: Disney animators drew 6,469,952 black spots for the film *101 Dalmatians*; there were 17,500,000,000 charcoal briquettes sold in 1988; and 24% of all Iowans display lawn ornaments. See *Harper's Index*, HARPER'S, May, 1989, at 15.

⁶⁰ I am indebted to my colleague Robert Lande for the following graphic elucidation of my several theses:



Law and Economics Formula:

$$\frac{(\# \text{ graphs})^2 (\# \text{ equations})^3}{\text{largest number in article}} \times \frac{(\text{reader IQ}) (\text{writer IQ})}{\# \text{ pages} + \# \text{ footnotes}} = \text{C.R.A.P.}$$

A remarkably similar law-and-economics graph was recently sighted in Gillette & Hopkins, *Federal User Fees: A Legal and Economic Analysis*, 67 B.U.L. REV. 795, 810 (1987). Such charts are as incomprehensible to lawyers as higher mathematics or advanced psychology are to

Two primary strains of footnote virus were identified early on in the law review epidemic: (1) the explanatory (or if-you-didn't-understand-what-I-wrote-in-the-text-here's-another-stab-at-it) type, and (2) the vainglorious (or if-you're-from-Kalamazoo-just-take-a-gander-at-this) variety.⁶¹

Most scholars, however, refuse to recognize footnoting as a disease at all, arguing the benefits that inure to both writer and reader of teensy typography. Indeed, they spare the reader a barrage of technical trivia he may not need, enable him to uncover shortcomings in authority, and allow for a smoother-running text. At the same time, they let a writer more easily separate basic concepts from nuances, and sometimes force him to justify his positions.⁶²

On occasion, notes become more important than text. Witness the famous footnote four in *United States v. Carolene Products Co.*,⁶³ in which Justice Stone announced the landmark principle of constitutional jurisprudence that statutes affecting "discrete and insular minorities" must be given strict scrutiny. There's also note fifty-nine in *United States v. Socony-Vacuum Oil Co.*⁶⁴ and note sixteen in *Terry v. Ohio*⁶⁵ (which has been cited well over a hundred times).

The most lucid analysis of the subject is a recent article by Arthur Austin,⁶⁶ whose tongue-in-cheek tone is somewhat overwhelmed both by serious assertions in defense of footnotes and by 107 of his own.⁶⁷ "In today's publish or perish environment," he writes, "footnote trashing is the slothful tenured establishment's last refuge of snobbery."⁶⁸ Au contraire, he suggests that footnoting permits one author to differentiate his work from another's — an "artistic and abstruse discipline that functions as a subtle, but critical, influence in the determination of promotion, tenure, and professional status."⁶⁹ Moreover,

laypersons. See, e.g., Grossman, *Stability in n-Dimensional Differential-Delay Equations*, 40 J. MATHEMATICAL ANALYSIS APPLICATIONS 541 (1972); G. ZURIFF, BEHAVIORISM: A CONCEPTUAL RECONSTRUCTION (1985). Grossman and Zuriff are close friends of the author. See *infra* note 62.

⁶¹ With all due respect to Rodell, cited above in note 2, at 40, I think my version is better.

⁶² See Martin, *supra* note 47, at 1097. They also allow a writer to cite self, family, friends, and colleagues. See, e.g., *supra* notes 28 & 60; *infra* notes 72, 109 & 113.

⁶³ 304 U.S. 144, 152 n.4 (1938); see also Balkin, *The Footnote*, 83 NW. U.L. REV. 275 (1988) (noting the importance of *Carolene Products'* footnote four from a deconstructionist's point of view).

⁶⁴ 310 U.S. 150, 224 n.59 (1940).

⁶⁵ 392 U.S. 1, 19 n.16 (1968).

⁶⁶ Austin, *supra* note 35.

⁶⁷ My congratulations to the reader discerning enough to question how I have the gall to chide Austin for his apparent hypocrisy, when I offer over a hundred notes of *my* own. My somewhat lame excuse ("the editors made me do it!" — see *supra* note *) is hereby accompanied by both abject apologies and an offer to supply another version of this selfsame piece — unannotated — to anyone who asks.

⁶⁸ Austin, *supra* note 35, at 1153.

⁶⁹ *Id.* at 1135.

footnotes "serve as embryos for new ideas and an underground source for humor"⁷⁰ (no doubt he refers to classics such as *The Common Law Origins of the Infield Fly Rule*⁷¹ and my own *Mockingbirds Among the Brethren*⁷²). Not least, he points out that footnoting helps create the aura of elevated status that ultimately furnishes academics with hefty consulting fees.⁷³

But as with the reviews themselves, the negatives far outweigh the positives. Even Austin recognizes the criticism that footnotes have become "a serious embarrassment to legal scholarship."⁷⁴ Others have called them "'phony excrescences,"⁷⁵ "a means of concealment,"⁷⁶ "hedges against forthright statements in the text,"⁷⁷ and little more than a "foible [that] breeds nothing but sloppy thinking, clumsy writing, and bad eyes."⁷⁸ Former Justice Arthur Goldberg felt that footnotes "cause more problems than they solve."⁷⁹ Judge Abner Mikva thought they represent dubious erudition — an "abomination" that he hates to read: "If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane."⁸⁰ Or, as Noel Coward put it, encountering a footnote "is like going downstairs to answer the doorbell while making love."⁸¹

It's hard enough to keep track of a modern scholar's train of thought without having to jump back and forth from text to note. But it's virtually impossible to comprehend footnotes that make ample use of the signals recommended by *A Uniform System of Citation* (the "Bluebook"). Show me someone who can explain the difference between *but see* and *but cf.* and I'll show you a world-class master of utterly useless distinctions.⁸²

The core of the problem is the lack of moderation. The notes often take on a life of their own, snuffing out whatever line of logic

⁷⁰ *Id.* at 1153.

⁷¹ 123 U. PA. L. REV. 1474 (1975).

⁷² 18 AM. CRIM. L. REV. 441 (1981).

⁷³ See Austin, *supra* note 35, at 1155.

⁷⁴ *Id.* at 1133.

⁷⁵ Mikva, *Goodbye to Footnotes*, 56 U. COLO. L. REV. 647, 647 (1985) (quoting Professor Rodell).

⁷⁶ D. MELLINKOFF, *LEGAL WRITING: SENSE AND NONSENSE* 94 (1982).

⁷⁷ *Id.*

⁷⁸ Rodell, *supra* note 2, at 41.

⁷⁹ Goldberg, *The Rise and Fall (We Hope) of Footnotes*, 69 A.B.A. J. 255, 255 (1983). Justice Goldberg may have resigned in part because of footnotes. Complaining about an appellate opinion with over 500 notes, he observed: "Had I remained on the Supreme Court, I would have reversed him on this ground because of the sheer impossibility of reviewing an opinion of this type." *Id.*

⁸⁰ Mikva, *supra* note 75, at 647-48.

⁸¹ Barrett, *supra* note 57, at 1 n.2, col. 3 (quoting Coward).

⁸² See A UNIFORM SYSTEM OF CITATION, rule 2.2(c) (14th ed. 1986).

the writer seeks to impart. If originality is the goal, why such excessive attribution? Compare the typically bloated American law review article with its British counterpart: the latter is generally leaner and cleaner, with far fewer footnotes — and hence eminently more readable.

Scholarship is no different from any other writing in its basic function: communication. But the geometric growth of footnote density⁸³ is fundamentally at odds with that purpose. Recognition of such counter-productivity has been slow in coming, but bubbles up here and there in new journals that publish shorter, more provocative articles, and in a few established law reviews — hoping to counter similar criticism of their own deadweight pieces — which include relatively note-free “Essay and Dialogue” sections.⁸⁴

B. Analysis: Separating the Taut from the Tautological

To Mr. Webster, “analysis” is simply (1) “separation of a whole into its component parts” and/or (2) “an examination of a complex, its elements, and their relations.”⁸⁵

For purposes of promotion and tenure, however, the term appears to defy definition — even though every P & T Committee requires that, for scholarship to pass muster, it must be “analytical.” Consider again the attempt made by the typical faculty manual noted earlier: to be analytical “[t]he materials must provide a detailed, well-supported and sophisticated analysis that increases our understanding of the topic, and must do more than describe a body of law or a legal problem.”⁸⁶ Talk about tautology: to be *analytical*, the materials must provide an *analysis*! In virtually every case, determination of whether an article increases our understanding of the topic or does anything more than describe a body of law or a legal problem depends almost entirely on subjective factors. The more familiar the reader with the subject matter, the less analytical the article; the more the reader favors a candidate, the better the analysis; and if the reader dislikes the candidate for any of many reasons, he can discreetly dismiss the analysis as wanting. This can be done in all manner of obfuscatory language. For example, a tenured associate generally regarded as an effective teacher was recently denied a promotion, largely based on a committee report stating that his work “did not disprove an accepted understanding of what the law is or how it works”; it did not provide “a fresh conceptual framework”; it did not “break new ground.”

⁸³ See Austin, *supra* note 35, at 1144-45.

⁸⁴ See, e.g., Essays and Correspondence sections of volumes 84 to 88 (present) of the *Michigan Law Review*.

⁸⁵ WEBSTER'S DICTIONARY, *supra* note 48, at 82.

⁸⁶ BALTIMORE FACULTY HANDBOOK, *supra* note 50, at H-1.6.

We'd be more intellectually honest (and fair) if we were to apply a more liberal meaning to the word "analytical." A workable definition, it seems to me, is "that which describes a body of knowledge, and offers an opinion about it." The true measure of an article's quality should be how well it describes the subject, how tautly it is written, and how cogent we think the opinion — even if we disagree. A more honest approach (with ourselves and our colleagues) would begin by conceding the semantic truism that practically everything is analytical to a degree — and by making our sincere and subjective judgment based on how well we like it (or its author).

Changing our definition of analysis to give it practical meaning would also help us escape the law review mindset, and thereby allow us to reward the writer of useful, enlightening, and provocative essays — as well as restatements, treatises, practice manuals, model legislation, and all manner of interdisciplinary texts.

C. Writing: Bugaboo of the Poobahs

It may be hard to say whether good writers are born or made, but it's painfully obvious that few of them are legal scholars. Law review prose is predominantly bleak and turgid. Moreover, it seems to be self-perpetuating. The brightest students, should they become teachers, are still browbeaten into writing what has been called a "wonderful profusion of humbug."⁸⁷ Many observers have noted the apprehension with which the law school elite regard a student or professor who resists legalese and insists on simple prose in writing and speech; the scholarship of such rare beasts is often regarded as suspect.⁸⁸

Similarly, length remains a hallmark of erudition. "[L]et your words be few,"⁸⁹ said Solomon himself, but the legal scholars continue to exalt quantity. Thus if a good writing professor suggests to the poobahs on the curriculum committee that they reduce the number of required pages in students' first-year memoranda or their third-year independent research papers, he will likely be voted down. Few faculty members understand that the shorter a memo, the more clear and effective it usually is. Nor would they fathom why Mark Twain once apologized for a lengthy letter by saying that he didn't have enough time to write a brief one; it's often more difficult to be concise. These are the same folks who make promotion-and-tenure decisions

⁸⁷ Shenefelt, *Disposable Scholarship*, Washington Post, Sept. 12, 1989, at A21, col. 1.

⁸⁸ See, e.g., Rodell, *supra* note 5, at 289; see also Wright, *supra* note 2, at 1460 (observing Rodell's belief that he was denied an endowed chair because he wrote for non-academic publications).

⁸⁹ *Ecclesiastes* 5:1.

based on the length of law review articles.⁹⁰ Next we'll be measuring page size as we tally up the footnotes.

The way law review articles are written may be the primary reason that they are so widely unread. The legal scholar's standard prose has been criticized as everything from "patronizing"⁹¹ and "pompous patois"⁹² to unintelligible "gibberish."⁹³ Its long sentences, awkward syntax, and overweening commitment to noncommittal buzzwords are at once impressive-sounding and useless.

The law reviews' pretentiousness and singular lack of humor have been noted earlier. Rodell himself suggested a means by which that weakness could be overcome: "The best way to get a laugh out of a law review is to take a couple of drinks and then read an article, any article, aloud. That can be really funny."⁹⁴

Humor aside, the reasons behind such poor writing may have as much to do with the perceived purpose of legal scholarship — indeed the scholar's understanding of the purpose of law itself — as with an inability to follow basic rules of grammar, syntax, and style.

Let us suppose that the purpose of law is the betterment of society. Although it is hard to see how the esoterica so often offered up by law reviews has any measurable application to real-life problem-solving,⁹⁵ let us assume these writers do have something serious to say that may be of value to society's decisionmakers, whether it is about law and literature, critical legal studies, feminist law — or dog bites in South Carolina.⁹⁶ Is there any justification for not saying it with greater clarity?

All too frequently the language of scholars is "far removed from the emotions, language, and understandings of the great majority of human beings,"⁹⁷ and the law they seek to analyze, criticize, explain, or change is lost in a sea of verbal molasses. Those who want to influence social policy in a more liberal direction have even greater reason to write understandable English. The intellectual movers and

⁹⁰ One faculty I know passed a by-law that a law review article of twenty pages or longer would presumptively satisfy its promotion-and-tenure standards — anything shorter and the burden of proof would shift to the candidate. The authenticity of this story has been verified by conversations with a number of colleagues.

⁹¹ See Getman, *supra* note 38, at 581.

⁹² See Rodell, *supra* note 5, at 289.

⁹³ See Benson, *The End of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 520-22 (1984-1985); Shenefelt, *supra* note 87.

⁹⁴ Rodell, *supra* note 2, at 40. Even law professors' intentional efforts at humor are likely to engender more groans than belly-laughs. See, e.g., *On the Lighter Side*, 39 J. LEGAL EDUC. 47-54 (1989); *On the Lighter Side*, 38 J. LEGAL EDUC. 359-68 (1988); see also Leibman & White, *supra* note 39, at 423 ("[M]ost attempts by legal writers to employ irony and hyperbole range from ill-advised to pathetic."). But see *supra* notes 71-72 and accompanying text.

⁹⁵ See Elson, *supra* note 34, at 347-99.

⁹⁶ See *supra* note 16.

⁹⁷ Getman, *supra* note 38, at 580.

shakers need the support of workers, activists, and politicians alike; new social orders are impossible when such diverse groups cannot comprehend one another's language — or feel alienated by it. Programs championed in the Ivory Tower but unheard or unfathomed in town or in board- or caucus-rooms are unlikely to see life beyond the scarcely-read pages upon which they are printed — a brief flicker between the time they come off the presses and when they begin to yellow, tightly bound in dusty library stacks.⁹⁸

But let us suppose further that there is value in scholars discoursing among themselves, that it is easier and more efficacious for them to use the specialized terminology familiar to those in the discipline. A central problem here is that such highly technical or narrowly targeted articles frequently appear in the general-interest law reviews. The tension between necessary jargon and editorial clarity, between influencing a small audience and accommodating a broader one, is overwhelming if not impossible. The lay lawyer reading a scholarly legal essay is hard put to understand it, much less see its search for Truth. His eyes glazeth over — not only at its length, but its style and substance as well.

One might argue that medical journals are every bit as impenetrable to the average doctor as law reviews to the lawyer, yet no one criticizes them for being too technical. But the analogy is weak: the "truths" sought are essentially different (a medical researcher examines the safety or effectiveness of a particular drug or procedure or therapy or policy, and bases his conclusions on specific empirical data), and most medical reviews are explicitly aimed at specialists in the field who understand the terms of art (there are relatively few general-interest scientific journals). Law professors, on the other hand, often engage in philosophical discourse that has little practical application, and their colloquies are seldom confined to special-interest reviews.

Communicating clearly, however — even about complex legal ideas — should not be an impossible task.

Charles Alan Wright recalls a legal writing seminar he took while a law student at Yale, in which his professor — none other than Fred Rodell — asked a guest scholar to pick one of his own articles, open it at random, and read a paragraph. The scholar obliged, says Wright, and read a paragraph "filled with the jargon and convolutions that mark most legal writing."⁹⁹ When he finished, Rodell asked him what the paragraph meant. "[He] sputtered for a moment and then gave a brief and clear explanation of the proposition he had stated at much greater length in the article. 'Why didn't you write it that way?', [Rodell] asked. The point was made."¹⁰⁰ To which Professor

⁹⁸ See *id.* at 588.

⁹⁹ Wright, *supra* note 2, at 1458.

¹⁰⁰ *Id.*

Wright adds: "I am sure that thirty years of very orthodox academic writing have corrupted my style, but I like to think that even today my books and articles and briefs are better because of what Fred taught me in that seminar."¹⁰¹

Students who may be naturally predisposed to avoiding difficult legal concepts will surely shy away from coming to grips with the nebulous ideas presented in a great many law review articles. The scholarly voice invites analysis by generalities and lacks the discipline demanded by empirical research. It requires students to learn a new, complex language that will probably be irrelevant to their future careers.¹⁰²

Lest you think this a diatribe without foundation, consider the following examples selected more or less at random from recent reviews. On law and literature:

It is one thing . . . to blur the divide between the creation and criticism of *literature*, and quite another to blur the distinction between the creation and criticism of *law*. Historically, the consequence of the blending of the law and the moral basis from which we criticize law has almost always been a politically regressive insistence upon the morality of existing power; and the present decade's fashionable denial of the difference between fact and value (whether indulged by the political left or by the political center) has proven to be no exception. The most obvious and compelling implication of the claim that there is no real difference between the law that is and the law that ought to be is that the law which is, is perfect: the law that is, is as it ought to be. The anti-positivist blurring of that which is from that which ought to be entails a non-critical, accepting complacency with the status quo.¹⁰³

Granted, this passage is taken out of context — but take it for granted that the context is every bit as abstruse. If you would rather flagellate yourself by attempting to understand such "scholarship," try answering these questions: how can the "creation" and "criticism" of either law or literature be regarded as parallels capable of distinction? How can the difference be blurred between the *creation* of a book (or film or work of art) and its *criticism*? How can the law and "the moral basis from which we criticize law" be blended? What is the difference between "fact" and "value"? Between "the law that is" and "the law that ought to be"? What is the writer trying to tell us? That his sense of syntax is out to lunch? Most readers of general-interest

¹⁰¹ *Id.*

¹⁰² See Getman, *supra* note 38, at 581.

¹⁰³ *Adjudication Is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203, 208-09 (1987). The names of the perpetrators of this and the next several passages have been withheld, in the hopes of preventing hard feelings and libel suits.

journals, unfamiliar with the specific scholarly voice, would not easily be able to discern a clear meaning.

Such illustrations appear all through law reviews aimed at broad readerships. On *Critical Legal Studies* (this from *Harvard*):

The two internal critical themes stand by synecdoche for the two major traditions of criticism of modern society that antedate the rise of modernist literature and philosophy. One of these traditions objects to the denial of solidarity and to the absence of the varieties of communal life that could mediate between the isolated individual and the large-scale organizations of the social world. The other tradition emphasizes the continuity of group domination under forms of practice and thought that both conceal and reproduce it. The deviationist doctrinal argument shows how the two traditions can merge into a more comprehensive and satisfactory line of criticism once analysis descends to institutional detail. The practical and theoretical solutions to the problem of overcorrecting and undercorrecting contract converge with the implications of the attempt to soften the antagonism between contract and community.¹⁰⁴

How many readers will be able to define or divine what "synecdoche" means? How many intellectual gear-shifts can they be expected to make in order to plow through the hazy double-negatives in "*objects to the denial . . . and to the absence of . . . that could mediate between*"? In the third sentence, does the closing "it" refer to "tradition"? To "continuity"? To "domination"? Where has the "analysis" in the next sentence been, before it "descends to institutional detail"? What is the intended connotation of "contract" in the last sentence? Responsible scholarship (or editing) would supply clarifications where needed, either in text or footnote.¹⁰⁵ All too often, though, the words stare back.

Meaning aside, elementary matters of grammar, style and syntax — what Swift referred to as "proper words in proper places"¹⁰⁶ —

¹⁰⁴ *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 645 (1983). Despite entreaties from various law review editors, I found it hard to shorten this excerpt. Its length not only underscores its longwindedness, but accurately suggests that this passage is one of many in the article equally difficult to decipher.

¹⁰⁵ For an example of good use of explanatory notes, see Fisher & Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1600-02 nn.87-100 (1983).

¹⁰⁶ Letter to a Young Clergyman (Jan. 9, 1720), reprinted in J. BARTLETT, *FAMILIAR QUOTATIONS* 322 (15th ed. 1980). Examples of weak syntax are easy to find, and likewise not limited to radical legal scholarship. Here are several from articles I've cited elsewhere in this Commentary: "Their environmental sensitivity, immense migrations, and economic value, combined with a long history of bitter allocation struggles, make anadromous fish a fruitful area for legal study." *Why Study Pacific Salmon Law?*, *supra* note 23, at 630. "Finally, it must be noted that there may well be situations where an animal attacks without provocation and has failed to behave in a manner reasonably calculated to provide the owner with prior notice or warning regarding its tendency or inclination to attack." *If Spot Bites the Neighbor, Should Dick and Jane Go to Jail?*, *supra* note 16, at 1474.

are often beyond the ken of authors and editors. If good writing is a reflection of clear thinking, the poobahs of scholarship are either a bunch of bumbleheads or a barrelful of bad writers. The weight of the evidence points to the latter.

Finally, these words-to-live-by from a feminist law professor:

The first purpose of this essay is to put forward the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory — by which I mean “liberal legalism” and “critical legal theory” collectively — is essentially and irretrievably masculine. My use of “I” above was inauthentic, just as the modern, increasing use of the female pronoun in liberal and critical legal theory, although well-intended, is empirically and experientially false. For the cluster of claims that jointly constitute the “separation thesis” — the claim that human beings are, definitionally, distinct from one another, the claim that the referent of “I” is singular and unambiguous, the claim that the word “individual” has an uncontested biological meaning, namely that we are each physically individuated from every other, the claim that we are individuals “first,” and the claim that what separates us is epistemologically and morally prior to what connects us — while “trivially true” of men, are patently untrue of women. Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly “connected” to another human life when pregnant. In fact, women are in some sense “connected” to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and “connecting” experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding. Indeed, perhaps the central insight of feminist theory of the last decade has been that women are “essentially connected,” not “essentially separate,” from the rest of human life, both materially, through pregnancy, intercourse, and breast-feeding and existentially, through the moral and practical life. If by “human beings” legal theorists mean women as well as men, then the “separation thesis” is clearly false. If, alternatively, by “human beings” they mean those for whom the separation thesis is true, then women are not human beings. It’s not hard to guess which is meant.¹⁰⁷

Let’s try to take this passage weakness by weakness. In the first sentence the plural possessive “their” does not agree with the singular noun it modifies, “theory.” Or should “claim” be plural? By “inauthentic,” does the writer mean “not genuine”? The standard student

¹⁰⁷ *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2–3 (1988). For an attempt to decipher the legal feminists’ agenda, see Bowles, *‘Feminist Scholarship’ and ‘Women’s Studies’: Implications for University Presses*, 19 SCHOLARLY PUBLISHING 163 (1988); and Lewin, *Feminist Scholars Spurring a Rethinking of Law*, N.Y. Times, Sept. 30, 1988, at B9, col. 3.

Webster's informs that "experiential" means "empirical"; why use both? The singular collective noun "cluster" at the beginning of the third sentence disagrees with the plural verb "are" near the end — a nitpick, perhaps, in view of the seventy-eight words piled on in between. What is meant by "epistemologically" as it is juxtaposed here with "morally"? Or by "trivially true" as it is placed within quotation marks? Is there any meaningful difference among the words "essentially," "necessarily," "inevitably," "invariably," "always," and "forever"? Why use them all, except to betray the writer's anger? (And if that's the case, why not add "fundamentally," "basically," and "elementary"?) Slogging through the rest of the paragraph, we are staggered by the syllogism at the end; it's doubtful that open-minded readers (particularly nonfeminists) will have an easy time guessing which conclusion is intended. What's it all mean? Those who have been especially dogged in trudging through this polysyllabic sludge may be left with little more than the flimsy notion that it is, after all, a man's world.

Is this brilliant insight, or intellectual quicksand? You decide.¹⁰⁸

My Commentary is of course less on the substance of these paragraphs than on their form. Whatever messages they seek to deliver are lost in a jumble of jargon and gibberish. The point is this: if our purpose as scholars is to explain and persuade, we are most likely to succeed if we write simply and clearly.¹⁰⁹

IV. NARCISSISM AND OTHER PERCEPTIONS

Why such passionate preoccupation with the irrelevant, such obeisance to the obscure? A final word about motivation is in order.

"Vanity of vanities, saith the Preacher, . . . all is vanity!"¹¹⁰

Besides the life-force craving of promotion and tenure, for many a law professor image is easily as important as substance. To treat the arcane in traditional academic prose is to impress one's colleagues. To be published, even cited, in an Ivy League law review is considered

¹⁰⁸ In the interest of fairness I conducted a mini-survey regarding this last excerpt. Of ten readers asked if they understood it, two said yes-I-think-I-do-but-it's-not-very-clear: a professor familiar with feminist literature, and the editor-in-chief of a leading law review. Eight said no-I-can't-figure-it-out: a practitioner who graduated magna cum laude from Harvard, a feminist librarian, a law review faculty advisor, a law-and-economics professor, a housewife with a master's degree in education, the author of nine published books, a law school dean, and a recent Rhodes Scholar.

¹⁰⁹ See Wright, *supra* note 2, at 1457-58. Even some law professors who fancy themselves good writers have lapses now and then. See, e.g., Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 112 (1984). But see Lessard, *What Do People Do All Day* (Book Review), Washington Monthly, Mar. 1972, at 41, 47 (comparing "Lasson's clean simple prose" with "[Ralph] Nader's cliché-ridden and windy" writing).

¹¹⁰ *Ecclesiastes* 1:2.

to be a feather in one's professional cap. To be spurned by the *East Parsipanny Journal of Nursery School Law*, on the other hand, is ignominy most bitter (and usually suffered alone, without telling even one's spouse).

Habitual publication in law reviews is especially useful to those professors who view themselves as Traveling Scholars, available on short notice to grace the halls of fellow law schools for a semester or two with their particular brand of out-of-town expertise. But even here the shinola quickly rubs off. And to be roundly ignored while visiting may be the worst blow of all to self-esteem, a measure of inferiority that is often visited in turn upon one's colleagues at home.

Scholarship thus becomes inalterably bound up in politics. It was a wise professor who said the reason academic politics are so sordid is that the stakes are so low.

V. OLIVE BRANCHES AND APOLOGIA (CONCLUSION AND SELF-PRAISE)

Biting the hand that feeds can be very satisfying when protected by tenure and academic freedom. But the point of this piece is to urge that we move away from rewarding "scholarship" alone — let's let the writers be writers, the scholars scholars, teachers teachers, and leaders leaders — and give them credit accordingly.¹¹¹ Let's recognize good writing as valuable, even if it's not in a law review, and promote service to the community at least every bit as much as journal scholarship of questionable worth. Let's mold faculty as position players, not as clones of one another. Let's require all to be at least minimally competent in the classroom and the library, but not require proof of professionalism by way of intellectual coercion or passage through the publication chute. Surely there are better ways to measure quality.

An olive branch to the Good Reader and Scholar alike: we should all be forgiven for giving in to the system, for nurturing it out of a strong sense of self-preservation — seeking if nothing else to put bread on our tables in the way we know best. We mean no harm, even if we offer little of lasting value.

I utter this Apologia with full recognition of my own knowing participation in the process, completely aware that whatever few readers are out there may indeed view Lasson's Scholarly Production as

¹¹¹ Again, the fact that this is hardly a new plea should underscore both its importance and the likelihood that it will go unheeded. As Bard states:

Scholarship is neither served nor celebrated by using it as the fine mesh to sift out some of our colleagues. Scholarship cannot be coerced, only cultivated. No one can stop a real scholar. And no useful end is served by squeezing some pages out of unwilling writers, who are enthusiastic teachers . . .

Bard, *supra* note 43, at 245; see Rodell, *supra* note 5 and accompanying text.

utterly useless — itself little more than the pretentious pap he so roundly excoriates.¹¹² True, I like to *think* I have had something original to say (and have guiltlessly accepted remuneration via research grant or summer stipend). Yet all of my “scholarship” — as that of most others — must be viewed as exceedingly modest when compared to that of a true scholar.¹¹³

Moreover, I am cognizant of the possibility that — though Solomon may have had a point — I myself may be unable to avoid cooking up yet another black pot of scholarly porridge, and thereby run the risk of various other professorial kettles recalling my past aspersions cast asunder.¹¹⁴

¹¹² Those interested in bashing my own scholarship are enthusiastically invited to do so. See, e.g., Lasson, *supra* note 109. My most recent pieces are *Free Exercise in the Free State: Maryland's Role in Religious Liberty and the First Amendment*, 31 J. CHURCH & ST. 419 (1989); and *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161 (1987).

¹¹³ (Like, say, my father — whose single small book on the fourth amendment has been cited frequently by the Supreme Court.) See N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937). See, e.g., *United States v. Leon*, 468 U.S. 897, 934 n.4 (1984); *Oliver v. United States*, 466 U.S. 170, 177 (1984); *Bush v. Lucas*, 462 U.S. 367, 375 (1983). LEXIS refers to a host of others.

¹¹⁴ Note, however, that I regard myself as in a no-lose situation. Should I attract a lot of flack for failure of understanding or gratitude, at least I will have finally provoked a thoughtful, if outraged, response to my work. And my articles will have been cited in the *Harvard Law Review*, even if it is I who has done the citing. On the other hand, if I get no response, well, that proves my point, doesn't it?